

**Wilkes Telephone Membership Corporation and International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1537.** Cases 11-CA-16165 and 11-CA-17122

July 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS  
HURTGEN AND BRAME

On June 13, 1997, Administrative Law Judge William N. Cates issued the attached decision. The General Counsel filed exceptions, a supporting brief, and an answering brief. The Charging Party Union filed exceptions with supporting arguments and citations of authority, an answering brief, and a reply brief. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing to deduct union dues pursuant to the checkoff provision of the parties' collective-bargaining agreement after the contract expired. The judge found that the contract provided for checkoff only during the term of the agreement, and he recommended that the complaint be dismissed on that basis. He also noted that the Board, with court approval, has consistently held that union-security and checkoff provisions are creatures of contract and remain in force only for the life of the collective-bargaining agreement. See, e.g., *Bethlehem Steel*, 136 NLRB 1500, 1502 (1962), remanded

on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).<sup>3</sup> The judge rejected the General Counsel's contention that a checkoff clause that does not implement a union-security provision, such as the checkoff clause at issue here,<sup>4</sup> is an employment term that survives the expiration of the contract and cannot be changed without bargaining with the Union. In their exceptions, the General Counsel and the Union reiterate this contention.

In *Hacienda Resort Hotel & Casino*, 331 NLRB No. 89 (2000), the Board rejected the identical argument. It held, in accordance with established precedent, that checkoff arrangements expire automatically, as a matter of law, on contract expiration, even in the absence of a union-security provision.<sup>5</sup> For the reasons discussed in *Hacienda Resort Hotel*, we find that the parties' dues checkoff arrangement expired with their contract as a matter of law, and we therefore affirm the judge's finding that the Respondent did not violate the Act by unilaterally ceasing to check off dues after the contract expired.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that this proceeding be remanded to the Regional Director for further consideration with regard to the settlement agreement in Case 11-CA-16165.

*Rosetta B. Lane, Esq.*, for the General Counsel.

*W. Britton Smith Jr., Esq.* and *Thomas E. Schroeder, Esq.* (Smith, Schroeder, Thomas, and Means), of Charlotte, North Carolina, for the Company.

*E. Han Massey, International Rep.*, of Monroe, North Carolina, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in Winston-Salem, North Carolina, on April 28, 1997. This is a refusal to bargain in good-faith case prosecuted by the National Labor Relations Board's (the Board) General Counsel (the Government) acting through the Regional Director for Region 11 of the Board following an investigation by Region 11's staff. The Regional Director for Region 11 of the Board issued an order consolidating cases, consolidated complaint, and notice of hearing (the complaint), on September 30, 1996, against Wilkes Telephone Membership Corporation (the Company) based on unfair labor practice charges filed on August 11, 1994,

<sup>1</sup> In its cross-exceptions, the Respondent argues that the judge erred in finding that it is not exempt from the Board's jurisdiction as a political subdivision of the State of North Carolina. Because we agree with the judge that the Respondent did not violate the Act, we find it unnecessary to address the jurisdictional issue.

The Respondent also contends that the judge inaccurately characterized the complaint as alleging that it unlawfully ceased to checkoff union dues when the parties' collective-bargaining agreement expired in August 1994. Although the Respondent admits that conduct, it notes that the complaint actually alleges that the Respondent discontinued dues checkoff about April 24, 1996. We correct the judge's error. The Respondent further contends that there is no record evidence to support the actual complaint allegation. Because we shall dismiss the complaint on other grounds, we find it unnecessary to address that contention.

<sup>2</sup> The Respondent has requested that the Board reinstate the settlement agreement in Case 11-CA-16165. The Regional Director approved that agreement on February 16, 1996, but revoked his approval on September 27, 1996, following the filing of the charge in Case 11-CA-17122. We deny the Respondent's request to reinstate the agreement, which is not contained in the record before us. However, in view of our dismissal of the complaint, we shall remand this proceeding to the Regional Director for further consideration with regard to the settlement agreement.

<sup>3</sup> Although he apparently did not base his decision explicitly on this ground, the judge stated that he "would find, if necessary, that the Company prevails on [that] defense."

<sup>4</sup> North Carolina is a "right-to-work" state, in which union-security provisions are unlawful. See Sec. 14(b) of the Act.

<sup>5</sup> See *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 fn. 15 (1988) (checkoff expired with contract in "right-to-work" state).

Although it did not base its decision in *Hacienda Resort Hotel* on the language of the checkoff provisions, the Board noted that the contract provisions in that case, like those at issue here, tied the checkoff arrangements to the duration of the contracts.

in Case 11–CA–16165 and July 24, 1996, in Case 11–CA–17122 by Local Union 1537, International Brotherhood of Electrical Workers, AFL–CIO, (Union).

Specifically, the complaint alleges the Company on or about April 24, 1996, refused and continues to refuse to bargain with the Union as the exclusive collective-bargaining representative of all employees in an appropriate unit by unilaterally and without notification to or bargaining with the Union discontinuing dues checkoff thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act, (the Act).<sup>1</sup>

In its timely filed answer to the complaint the Company denies violating the Act in any manner alleged in the complaint.

The Company asserts the Board should not exercise jurisdiction over it because it is a political subdivision of the State of North Carolina.

I have studied the whole record,<sup>2</sup> the parties briefs, and the authorities they rely on. Based on more detailed findings and analysis below, I will conclude the Board has and should exercise jurisdiction over the Company, however, and I will dismiss the allegation the Company violated the Act by ceasing to deduct union dues at the expiration of the contract.

## FINDINGS OF FACT

### I. THE FACTS

The facts outlined here are admitted, stipulated to, and/or not in dispute.

The Company is a North Carolina corporation, incorporated under chapter 117 of the North Carolina General Statutes, Electrification. The Company generates revenue in excess of \$250,000 from its activities. The Company provides telephone service to approximately 9006 subscriber/members located in four areas of Wilkes County, North Carolina, known as the Champion, Lomax, Boomer, and Clingman Exchanges. The Company is the only provider of central office telephone service in the assigned territory of Wilkes County. Other areas of Wilkes County are provided telephone service by Yadkin Valley Telephone Membership Corporation<sup>3</sup> and Centel/Sprint, Inc.,<sup>4</sup> an investor-owned company. The service areas of the Company do not correspond to any legislatively established boundaries.

The State of North Carolina provides for the creation and regulation of telephone membership corporations through the State Rural Electrification Authority (NCREA). In North Carolina, a telephone membership corporation (TMC) cannot be created unless NCREA conducts certain investigations concerning the need for telephone service and subsequently authorizes the formation of the TMC in accordance with chapter 117.

The purposes of NCREA are set forth in chapter 117 of the North Carolina general statutes. In the main, NCREA is charged with securing adequate electrical and telephone service for the rural districts of the state where such service is not now being rendered. In addition, NCREA files loan applications on behalf of telephone membership corporations with the United States Rural Utilities Service Administration an agency of the United

States Department of Agriculture. Rural Utilities Service (RUS), formerly Rural Electrification Administration (REA), provides loans to telephone membership corporations. NCREA assists telephone membership corporations in developing loan applications and work plans. NCREA approves those applications and work plans before making application to RUS for financial assistance in constructing the telephone membership corporation's system and system improvements. The NCREA also processes, reviews, and mediates member/subscriber complaints concerning the service provided by the telephone membership corporation to its member/subscribers.

Section 117-13 of the North Carolina General Statutes provides that each corporation formed under this article shall have a board of directors, in which management of the affairs of the corporation is vested. The directors of the corporation, other than those named in its certificate of incorporation, shall be elected annually by the members entitled to vote, but if the bylaws so provide the directors may be elected on a staggered-term basis, provided, that the total number of directors on a board shall be so provided that not less than one third of them, or as nearly thereto as their division for that purpose will permit, shall be elected annually, and no term shall be longer than for 3 years; and provided further that, except as may be necessary in inaugurating such a plan, all directors shall be elected for terms of equal duration. The directors shall be entitled to receive for their services only such compensation as is provided in the bylaws. The board shall elect annually from its own number a president and a secretary. The directors must be members of the corporation. Pursuant to statute, the board can adopt and amend bylaws for the management and regulation of the affairs of the corporation, but the certificate of incorporation may reserve to the members of the corporation the power to amend the bylaws, the board can appoint agents and employees and fix their compensation and the compensation of the officers of the corporation; the board can execute instruments; the board can delegate to one or more of the directors or to the agents and employees of a corporation such powers and duties as it may deem proper; and the board can make its own rules and regulations as to its procedures.

The business and affairs of the Company is managed by a board of 10 directors, herein referred to as the directors. The directors serve 3-year staggered terms, and they are not compensated. The directors are elected by members of the Company and from among those members of the Company who are natural persons. A director must be a member of the Company, and a bona fide resident of the exchange he/she is to represent. A director cannot be employed or financially interested in a competing enterprise. The board of directors meets at regular monthly meetings. The minutes of these meetings are not open to the general public. The president of the Company, or three of the board of directors, can call a special meeting of the board. Special meetings of the members of the Company can be called by resolution of the board, or on written request signed by any five directors, by the president, or by not less than 500 members or 10 percent of the members. The board will hold an annual meeting of the members of the Company to pass on reports for the previous audit year, elect board members, and transact other business as may come before the meeting.

Telephone rates are set by the Company's board of directors and are subject to the provisions of chapter 117. Investor-owned and commercial telephone companies are subject to rate regulation by the North Carolina Public Utilities Commission, under the provisions of G.S. 62-3, et seq.

<sup>1</sup> The allegation set forth in par. 13(b) of the complaint was withdrawn by the Government at trial.

<sup>2</sup> The Government's unopposed motion to correct Exh. 1 to Jt. Exh. 1 is granted. The Government's motion is made a part of the record as Ct. Exh. 1.

<sup>3</sup> Yadkin Valley TMC has approximately 100 subscriber/members on the fringe of Wilkes County.

<sup>4</sup> Centel/Sprint, Inc., has approximately 17,000 customers in Wilkes County, servicing primarily in the cities of Wilkesboro and North Wilkesboro, North Carolina.

The Company is governed by the bylaws of Wilkes Telephone Membership Corporation, herein referred to as bylaws.<sup>5</sup> The bylaws provide that any person, firm, association, corporation, or body politic or subdivision thereof may become a member of the Company by making application, purchasing service, complying with the articles of incorporation, the bylaws, and any rules and regulations adopted by the board, paying a membership fee, and granting a right of way to the Company for poles, braces, lines, and cables.

A landlord may pay the membership fee for tenants and thus, become a member of the Company. The landlord is entitled to vote on all matters which members of the Company may vote and is liable for any charges for telephone service which may be assessed against the tenant. The tenant would not be a member.

A husband and wife may apply for a joint membership of the Company, and the presence of either or both at a meeting is regarded as the presence of one member; the vote of either separately or both jointly is one joint vote, a proxy signed by either or both is a joint proxy, notice to either is notice to both, expulsion of either shall terminate the joint membership; and withdrawal of either terminates the joint membership. Either, but not both, may be elected or appointed as an officer or director.

An employee of the Company cannot be a member, but the employee can receive service under the terms and conditions adopted by the board.<sup>6</sup>

Any member of the Company may withdraw from membership upon compliance with such uniform terms and conditions as the board may prescribe. The board of the Company may, by vote of not less than two-thirds of all members of the board, vote to expel any member of the Company who fails to comply with any of the provisions of the articles of incorporation, bylaws, or rules and regulations adopted by the board. An expelled member may be reinstated by vote of the board or by vote of the members at an annual or special meeting.

Membership of a subscriber/member of the Company who for a period of 30 days after service is available, has not permitted the installation of service or of a member who has ceased to purchase service from the Company may be canceled by resolution of the board.

Each member of the Company is entitled to one vote and all questions shall be decided by a vote of a majority of the members voting thereon in person or by proxy. Any members of the Company, including associations, corporations, business trusts, or bodies politic may vote by proxy if the proxy is registered with the secretary before the third business day prior to the meeting or any adjournment thereof. No member of the Company can hold more than one membership which carries a voting right. No member of the Company is responsible for the debts or liabilities of the Company.

A nominating committee appointed by the board nominates members of the Company for election to its board of directors. Fifty or more members of the Company who are residents of a particular exchange acting together may make additional nominations for the director. Any member of the Company may request removal of a director for malfeasance by filing a petition seeking the removal along with a petition signed by at least 10 percent of the members or 500, whichever is less, with the secretary. The question of removal will be voted on by the members at a meet-

ing of members. A vacancy on the board other than by removal by the membership is filled by vote of the majority of the remaining directors for the unexpired term of the vacant position.

The officers of the Company, here referred to as officers, are Edward Church, president; Charles Absher, vice-president; Thad Darnell, secretary; and Jarvie Mathis, treasurer. The officers are elected annually from the members of the board. The president is the principal executive officer of the Company and presides at all meetings of the members and the board, signs documents on behalf of the Company, and performs other duties incident to the office of president. The board of the Company has appointed Clifton H. Guffey, as the general manager and CEO. Guffey is not a member of the Company. The powers, duties, and compensation of officers and agents of the Company are fixed by the board. The powers, duties, and compensation of employees are set by the board in conjunction with the general manager.

Pursuant to North Carolina General Statutes, chapter 117, the Company can sue and be sued, and can hold and dispose of property, real and personal, tangible, and intangible. The Company does not, however, have the power of eminent domain. NCREA, in accordance with the North Carolina General Statute, chapter 117, sections 117-2 and 117-18, exercises the power of eminent domain for the benefit of the Company.

The State of North Carolina, by statute, declares that a telephone membership corporation organized under chapter 117 is a public agency and it shall have within its limits for which it was formed the same rights as any other political subdivision of the State, and all property owned by the telephone membership corporation and used exclusively for the purpose of the corporation shall be held in the same manner and subject to the same taxes and assessments as property owned by any county or municipality of the State so long as the property is owned by the telephone membership corporation and is used for the purposes for which the corporation was formed.

NCREA works directly with the general manager of the Company in regard to monitoring legislative matters, budgets of the Company, subscriber/member complaints and questions, and relations with the Federal RUS relating to obtaining loans. NCREA makes loan applications to RUS on behalf of the Company. NCREA must investigate and approve loan applications and the work plans. After NCREA obtains approval for a loan application for the Company, RUS must approve the contractor that the Company selects to perform its system improvements. Most major construction projects are bid out to independent contractor construction firms. RUS, through its field representative, opens the bids and selects the contractor, normally on the low bid. The RUS field representative must then inspect the contractor's work, approve same, and authorize payment. RUS loans the Company money for the purposes of the construction and addition to its telephone system and has authority over the Company only as long as there are current loans outstanding.

The Company has an outstanding loan balance from RUS in the amount of \$11,205,154.56 as of December 31, 1994. The remaining term left on those outstanding notes is approximately 25 years. The Company may seek additional loans from RUS for future construction. RUS has both an accountant and field engineer in North Carolina. The accountant and field engineer are responsible for reviewing the Company's work plan and construction budget, assisting in the development of same, and recommending changes in the work plan. Unless the field engineer and accountant are in agreement with the Company's proposed work plan, the same will not be approved for the purposes of securing a loan. The RUS field engineer and accountant work

<sup>5</sup> The bylaws may be altered, amended, or repealed by the vote of a majority of the members of the board at any regular or special meeting.

<sup>6</sup> Approximately 15 employees receive telephone service through the Company.

closely with NCREA in regard to loan applications by the Company.

The Company files monthly and annual financial reports with the NCREA and RUS. These records are available to the public. The records of the Company are not open to the public otherwise, except for any filings that may occur before the North Carolina Public Utilities Commission. The Company, in accordance with the North Carolina General Statute, chapter 117, article 1, section 117-3.1, is subject to a regulatory fee.

NCREA has no involvement in the terms and conditions of employment of the employees of the Company.

The Company is exempt from Federal income taxes as an instrumentality of the State of North Carolina under IRC § 115 [income of states, municipalities, etc.]. The Company is exempt from Federal excise tax, State income tax, and does not pay State sales tax. The Company is exempt from local ad valorem taxes.

The Company vehicles are tagged with permanent State tags.

Under North Carolina General Statute, section 117-34, any telephone corporation created under article 4 may be dissolved by filing a certificate of dissolution. Such corporation shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations and collecting or liquidating its assets, and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name. Any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall pass to and become the property of the State.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

The Union was certified by the Board as the collective-bargaining representative of all inside and outside plant department employees employed at the Company's Wilkesboro, North Carolina facility, excluding office clerical employees, guards, watchmen, and supervisors as defined in the Act. There are currently 16 employees in the above described unit. The Company employees, a total of approximately 35 employees are at its Wilkes County, North Carolina facility.<sup>7</sup>

After certification, the Union and the Company entered into successive collective-bargaining agreements, the most recent of which expired in August 1994.

As noted elsewhere, the Union filed a charge in Case 11-CA-15961 on April 12, 1994. The Regional Director for Region 11, by letter dated May 25, 1994, dismissed the charge for lack of jurisdiction in accord with *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), and *Fayette Electrical Cooperative*, 308 NLRB 1071 (1992)<sup>8</sup> (*Fayette I*). The Union subsequently requested that the charge be withdrawn and the Regional Director for Region 11, by letter dated July 5, 1994, revoked the dismissal and approved the Union's withdrawal request.

By letter dated June 14, 1994, the Company notified the Union that "in as much as the Board no longer asserts jurisdiction over telephone cooperatives, this letter will also serve as notice that the Cooperative does not intend to negotiate a new agreement."

The Union filed a charge against the Company in Case 11-CA-16165 alleging repudiation of a bargaining obligation. The

Regional Director for Region 11 dismissed the charge for lack of jurisdiction in accord with *Fayette I*. The Union appealed the dismissal. While the dismissal was pending the Board issued its decision in *Concordia Electric Cooperative*, 315 NLRB 752 (1994), which overruled significant portions of *Fayette I*. The Office of Appeals returned the charge to the Regional Director for Region 11 for reconsideration of the jurisdictional issue. Applying *Concordia Electric Cooperative*, supra, the Regional Director for Region 11 determined that the Board did have jurisdiction and that the Company violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union. A complaint and notice of hearing issued on March 30, 1995, asserting jurisdiction and alleging a violation of Section 8(a)(1) and (5) of the Act.

By letter dated August 18, 1980, the Equal Employment Opportunity commission (EEOC), pursuant to its regulations, rescinded a notice of right to sue to a complainant against the Company because the EEOC's procedural regulations give it the authority to issue a notice of right to sue only when the charge to which the request relates is filed against a respondent other than a government, governmental agency, or political subdivision. The EEOC letter stated that documentary evidence gathered after the issuance of the claimant's right to sue letter indicated the Company is a political subdivision.

## II. THE QUESTION OF JURISDICTION

The first question presented is whether the Company, a telephone cooperative, is exempt from the Board's jurisdiction as a political subdivision.

Section 2(2) of the Act exempts, from the Board's jurisdiction, *inter alia*, "... any state or politician subdivision thereof ... ." The Board, in *Concordia Electric Cooperative* supra; *Fayette Electrical Cooperative*, supra (*Fayette I*); and *Fayette Electrical Cooperative*, supra (*Fayette II*), and citing *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. at 604-605, stated that for an entity to be exempt from the Board's jurisdiction as a political subdivision, it must either: (1) have been created directly by a state, so as to constitute an arm or department of the Government; or (2) be administered by individuals who are responsible to public officials or to the general electorate. The Court in *Hawkins County* held "[f]ederal rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political subdivision' of the State and therefore not an 'employer' subject to the Act." The Court in *Hawkins County* held "it is the actual operations and characteristics" of an employer that must be examined to determine whether or not an employer is a "political subdivision" within the meaning of the Act. The Court in *Hawkins County* noted:

The term "political subdivision" is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning.

The Court in *Hawkins County* went on to observe:

The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to exempt from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.

*Concordia Electric* supra sets forth Board law and controlling guidance on whether cooperatives, such as the one here, is exempt from its jurisdiction as a political subdivision.

<sup>7</sup> There are eight other TMCs in existence in North Carolina. None of those eight have collective-bargaining relationships with any union.

<sup>8</sup> The jurisdictional status of *Fayette Electric Cooperative*, was relitigated in *Fayette Electric Cooperative*, 316 NLRB 1118 (1995) (*Fayette II*), where the Board asserted jurisdiction over the employer based on a different record.

A detailed review of the facts and holding in *Concordia Electric*, supra, is helpful. *Concordia Electric* is a nonprofit Louisiana corporation engaged in the distribution and sale of electrical energy to certain customers in Ferriday, Jonesville, and Jena, Louisiana, as well as certain surrounding rural areas. *Concordia Electric* was incorporated pursuant to the Louisiana Electrical Cooperative Law (LA. R.S. 12:401, et seq.) which provides, *inter alia*, only those persons receiving electrical power from a cooperative and the cooperative's incorporators may be members of the cooperative. Louisiana law creating *Concordia Electric* provides that "any natural person, firm, association, corporation, business trust, partnership, federal agencies, state or political subdivision, or agency thereof, or any body politic" may be a member of an electric cooperative. *Concordia Electric*, in its bylaws states that any person, firm, corporation, or body politic may become a member by paying a \$5 membership fee, agreeing to purchase its electrical power from the cooperative, and to abide by *Concordia Electric's* articles of incorporation bylaws, rules, and regulations. *Concordia Electric's* bylaws further provide that no such person, firm, corporation, or body politic may hold more than one membership and that a husband and wife may hold a joint membership. *Concordia Electric* (at the pertinent time) had approximately 8250 members including members who are natural persons of voting age in the service area, married couples, and entities such as churches, corporations, and businesses.

The Board noted *Concordia Electric* is governed by a board of directors elected by mail ballot and that each member is entitled to cast one vote for the election of each of the directors who serve for 3-year staggered terms and may be removed during their term by a vote of the membership or a petition signed by at least 10 percent of the members. *Concordia Electric's* directors do not receive any compensation for their services although they may be reimbursed for expenses incurred while attending functions or meetings on *Concordia Electric's* behalf. The directors in *Concordia Electric* must be members in good standing and bona fide residents of the area served by *Concordia Electric* and may not hold or be a candidate for a paid elective public office.

The Board further noted that *Concordia Electric* is subject to regulation by the Louisiana Public Service Commission with respect to rates and service. The Louisiana Public Service Commission also investigates complaints concerning poor service, incorrect billing, and related matters. Private investor-owned utilities in the State of Louisiana are subject to Louisiana Public Service Commission while utilities owned or operated by a political subdivision of the State of Louisiana are expressly exempted from the Louisiana Public Service Commission's regulatory jurisdiction by the Louisiana Constitution (La. Const. art. 4, sec. 21(c)).

The Board noted that Louisiana Law grants electrical cooperatives and investor-owned utilities the power of eminent domain over private property.<sup>9</sup>

The Board in *Concordia Electric*, supra, noted that as a result of outstanding loans from the Federal Rural Electrification Administration, *Concordia Electric* was subject to certain operating and accounting restrictions by the federal rural electrification administration as a condition of receiving the loans. The Board also noted that once any outstanding loans are repaid, the Federal Rural Electrification Administration's authority over *Concordia*

*Electric* ceases. The Board noted that *Concordia Electric* is exempt from Federal income and excise taxes but that *Concordia Electric* was subject to State sales and property taxes as well as a Louisiana Public Service Commission levied inspection and supervision fee. The Board also noted that *Concordia Electric* is exempt from state income taxation except that *Concordia Electric* must pay an annual fee of \$10 for each 100 persons to whom it supplies electrical service within the State of Louisiana.

The Board in *Concordia Electric*, supra, noted that meetings of *Concordia Electric*, as well as most meetings of its board of directors are open to all members. The Board went on to note, however, that *Concordia Electric* may, and has, excluded non-members from such meetings. The Board noted that *Concordia Electric* periodically files certain financial information concerning its operations with the Federal Rural Electrification Administration as well as the Louisiana Public Service Commission. The Board noted that such filings generally are subject to disclosure by those agencies to the public on request. The Board concluded in *Concordia Electric*, supra, that there was no evidence or contention that *Concordia Electric's* records are otherwise open for inspection by the public.

Within the framework of the above factual description<sup>10</sup> the Board concluded *Concordia Electric* was subject to its jurisdiction.

First, I note the Board found no evidence (or contention) in *Concordia Electric*, supra, that *Concordia Electric* was created directly by the Government of the State of Louisiana or that its board of directors was responsible to any public official of the state. In the case before me, it is likewise clear the Company was not directly created by the State of North Carolina, nor is its board of directors responsible to any public official.

As in *Concordia Electric*, supra, I must determine whether the Company herein is administered by officials who are responsible to the general electorate. The Board in *Concordia Electric*, supra, stated:

[W]e will find an entity "responsible to the general electorate" only if the composition of the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type and degree of popular political control.

The Board in *Concordia Electric*, supra, concluded the cooperative's membership was not coextensive with residency in the geographical area served and that persons residing in the geographical territory served by *Concordia Electric* were not members of *Concordia Electric*. The Board in *Concordia Electric*, supra, noted that members in *Concordia Electric* may include persons who did not reside for voting purposes in the geographic territory served by *Concordia Electric* and may even include individuals who do not reside for voting purposes in the State of Louisiana. The Board further noted that a single household may have more than one voting age resident, yet only have one membership in *Concordia Electric*. The Board also noted *Concordia Electric's* membership included entities such as corporations, associations, Federal and State agencies which cannot be said to be residents of the geographic area and not entitled to vote in any State or Federal elections in Louisiana. The same factors are present in the instant case such as to compel the conclusion the Company's administrators are not "responsible to the general

<sup>9</sup> The Board, in *Concordia Electric*, supra, concluded that there was no evidence or contention that *Concordia Electric* had the authority to condemn public property.

<sup>10</sup> The factual description has been taken from the Board's Decision, for the most part, without quotations.

electorate” and thus the Company herein is not exempt from the Board’s jurisdiction. Stated differently the administering body of the Company is made up of a board of directors elected by its members; however, the members are not synonymous with the “general electorate” as defined by the Board in *Concordia Electric*, supra. Members are not synonymous with the “general electorate” in the instant case: for example, a single household may have more than one voting age resident, yet only one membership; landlords who are members may even live in a different county, State, or country and employees may live within the service area and yet not be eligible to be members.

Furthermore, the Company herein functions in a manner almost identical to Concordia Electric and numerous factors considered by the Board in *Concordia Electric*, supra, are present in the instant case. Similarities for example, include the fact the Company herein is a North Carolina corporation incorporated under the general statutes of the State of North Carolina and is engaged in providing central office telephone service in a specifically assigned territory of Wilkes County, North Carolina. As was the case in *Concordia Electric*, supra, only persons, firms, associations, corporations, body politics, or subdivisions who apply for membership, purchase service, comply with the articles of incorporation and bylaws and rules and regulations adopted by the Company, may be members of the Company. As was the case in *Concordia Electric*, supra, a landlord may pay the membership fee for tenants and become a member and a husband and wife may apply for joint membership. The Company herein, as was the case in *Concordia Electric*, supra, has a board of directors who serve 3-year staggered terms and are elected by members of the Company from its members who are natural persons. As in *Concordia Electric*, supra, directors of the Company may be removed by a vote of membership based upon a petition signed by a specified percent of the members and all directors must be members of the Company and bona fide residents of the exchange in the Company that he/she is to represent and may not be employed by or have a financial interest in any competing enterprise.

Unlike the situation in *Concordia Electric*, 315 NLRB 752 (1994), the Company here does not have the power of eminent domain. This lack of the power of eminent domain strongly suggests the Company here is not a political subdivision of the State of North Carolina.

The Company here, as was the case in *Concordia Electric*, supra, has outstanding loans from the Rural Utilities Service (formerly Rural Electrification Administration) and is subject to certain accounting restrictions but once the loans are repaid, the Rural Utilities Service’s authority over the Company expires. The Company is exempt from State and Federal income tax, Federal excise tax, and is only subject to North Carolina sales tax and a regulatory fee.

All the above factors, analyzed in light of the Board’s teachings in *Concordia Electric*, supra, clearly establishes the Company herein was not created directly by the State of North Carolina so as to constitute an entity of the State, nor is it administered by individuals who are responsible to public officials of the State or the general electorate.<sup>11</sup>

Accordingly, I find the Company is not exempt from, but rather subject to, the jurisdiction of the Board.

<sup>11</sup> I find of no controlling significance that the vehicles utilized by the Company are tagged with permanent state tags; or that the Federal EEOC has declined to assert jurisdiction over the Company.

The Company’s argument the Board should not assert jurisdiction over it because the Board’s analysis is irrational and fails to effectuate the purposes of the Act<sup>12</sup> is best directed to the Board. I am required to apply Board law.

### III. DISCONTINUING DUES CHECKOFF

Having concluded the Board has jurisdiction over the Company here, I shall now turn to whether the Company’s unilaterally discontinuing dues checkoff violated the Act.

It is alleged at paragraph 13(a) of the complaint that commencing on or about April 24, 1996, and at all times thereafter the Company refused and continues to refuse to bargain with the Union in that the Company unilaterally and without notification to or bargaining with the Union discontinued dues checkoff.

The Company admits it ceased dues deductions after the expiration of the parties collective-bargaining agreement which expired on August 16, 1994. The Company asserts it did so because there was no existing collective-bargaining agreement authorizing or mandating it to continue dues deductions.

By letter dated June 26, 1995, the Union requested the reinstatement of dues deductions. The Company notified the Union in writing, by its counsel, that it was “premature to reinstate dues deduction” such as had existed in the expired contract.

Article XIV of this most recently expired collective-bargaining agreement states:

#### DUES CHECK-OFF

- 14:01 During the term of this agreement, the Company agrees to deduct Union dues and initiation fees on a monthly basis for each employee covered by this Agreement who signs and submits to the Company an individual authorization for payroll deduction in the form attached as Appendix “B.” Such authorization shall be irrevocable for a period of one (1) year from the date of the authorization or until the termination of this agreement, whichever occurs first. Any employee who has authorized the deduction of Union dues from his wages may revoke such authorization by giving the Company and the Union notice in writing of his desire to do so at least ten 10 days prior the termination dates of his authorization.
- 14:02 Such deduction will be paid to the Union against the receipt thereof in the name of the Financial Secretary of the Union. The Financial Secretary of the Union agrees to furnish to the Company notice of the amount to be uniformly deducted for Union dues and initiation fees pursuant hereto and the Union official authorized to receive such deduction.

Appendix “B” to the parties most recent collective-bargaining agreement follows:

#### APPENDIX B

I hereby authorize and direct \_\_\_\_\_  
to deduct from my pay, union dues in the amount fixed in  
accordance with Bylaws of Local Union \_\_\_\_\_.

<sup>12</sup> The Company’s argument that the Board’s two-factor analysis fails to effectuate the purposes of the Act is based on its assertion the Board should not exercise jurisdiction over an entity that is declared by statute to be a public agency, that is exempt from Federal income taxation as a political subdivision, and that has been determined by the Federal EEOC to be a political subdivision.

and the Constitution of the International Brotherhood of Electrical Workers and pay same to said Local Union in accordance with the terms of the bargaining agreement between the Employer and Union.

This authorization shall be irrevocable for a period of one (1) year from the date hereof or until the termination date of said Agreement, whichever occurs sooner, and I agree that this authorization shall be automatically renewed and irrevocable for successive periods of one (1) year unless revoked by written notice to you and the Union ten (10) days prior to the expiration of each one (1) year period, or of each applicable bargaining agreement between the Employer and the Union, whichever occurs sooner.

North Carolina is a right-to-work State.

The Government (and the Union) acknowledge that dues checkoff arrangements that implement union-security requirements are considered to be creatures of contract that do not survive the expiration of a collective-bargaining agreement. The Government argues the line of cases related to checkoff clauses which expire with the contract should not apply or be considered controlling because North Carolina is a right-to-work State. Stated differently, the Government “asserts that checkoff clauses that do not implement union security provisions and Section 8 (a)(3) of the Act survive expiration of an agreement.” The Government urges “[i]n the current case, the issue of dues check off is a mandatory subject of bargaining and thus no changes may be made by [the Company] regarding the voluntary, unrevoked checkoffs without bargaining with the Union.” The Government contends “[s]ince the employees [herein] did not seek to revoke their authorizations, the authorizations should not be presumed to have expired with the expiration of the collective bargaining agreement.” Thus, the Government argues: “[s]ince a checkoff clause that does not implement a union security requirement is an 8(d) subject which survives the expiration of the parties’ agreements and since [the Company] has failed to bargain to impasse over the discontinuance of the checkoff provision of the expired contract, [the Company] violated Section 8(a)(5) of the Act by stopping its deductions of union dues.”

The Company asserts the law required it to do exactly as it did and argues the Government is simply attempting to have Board precedent overruled. The Company urges such should not be done. The Company also asserts pertinent applicable contract language permitted it to do exactly as it did.

I find the Company prevails on either or both of its defenses.

The parties’ collective-bargaining agreement, specifically the checkoff provisions, are crystal clear. The parties’ expired agreement provides for dues deductions *only* during the term of the agreement. The checkoff authorizations form set forth in appendix B of the parties’ agreement is inextricably intertwined with the agreement such that such authorizations do not survive the expiration of the contract. Stated differently, the applicable expired contract requires checkoff authorizations be in the form provided in appendix B<sup>13</sup> of the contract. The language of the checkoff authorization form authorizes the Company to deduct union dues from employees pay only “in accordance with the terms of the bargaining agreement between the [Company] and Union.” The contract states in clear and unambiguous language that the Company agrees to deduct union dues from the pay of those providing the specified authorization form “[d]uring the

term of this agreement.” Considering the language of the checkoff authorization and the contract together, I am compelled, by the clear language of the parties’ agreement, to find that the authorizations of deductions of union dues is *only* allowed during the term of the contract. Based on this defense of the Company alone, I recommend dismissal of the allegation the Company unilaterally, and without notification to or bargaining with the Union, discontinued dues checkoff.

I would find, if necessary, the Company prevails on its second defense.

The Government, as noted throughout this Decision, alleges the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally discontinued dues checkoff upon the expiration of the parties’ most recent agreement. Reduced to a simply statement, the Government contends a checkoff clause that does not implement a union-security requirement is an 8(d)<sup>14</sup> subject which survives the expiration of an agreement, and since the Company herein failed to bargain to impasse over the discontinuance of the checkoff provision of the expired contract it violated Section 8(a)(5) of the Act when it stopped deducting dues. As correctly noted by the Government, the Board has held that most terms and conditions of employment established in a contract survive expiration of the contract and cannot be changed without bargaining to impasse thereon. The Supreme Court in *NLRB v. Katz*, 369 U.S. 736 at 743 (1962), held an employer’s unilateral change in terms and conditions of employment under negotiation violates Section 8(a)(5) of the Act,<sup>15</sup> inasmuch as such constitutes a circumvention of the duty to negotiate which in turn frustrates the objectives of Section 8(a)(5) of the Act. The Board has held there are exceptions to *NLRB v. Katz* specifically for union shop as well as for dues checkoff provisions.

The Board noted in *Bethlehem Steel*, 136 NLRB 1500, 1502 (1962),

In accord with Board and court decisions, we find that union security, checkoff, preferential seniority, and a grievance procedure are matters related to “wages, hours, and other terms and conditions of employment” within the meaning of Section 8(d) of the Act and, therefore, are mandatory subjects for collective bargaining.<sup>5/</sup>

Notwithstanding the fact that union security and checkoff are compulsory subjects of bargaining, and that Respondent acted unilaterally with respect to them, we find nothing unlawful in Respondent’s action here. The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. Consequently, when, upon expiration of its contracts with the Union, the Respondent refused to con-

<sup>13</sup> Appendix B is set forth elsewhere in full in this Decision and will not be repeated here.

<sup>14</sup> Sec. 8(d) of the Act provides in pertinent part “to bargain collectively is the performance of the mutual obligation of employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to the wages, hours, and other terms and conditions of employment.”

<sup>15</sup> Sec. 8(a)(5) of the Act states “it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).”

tinue to require newly hired employees to join the Union after 30 days of employment, it was acting in accordance with the mandate of the Act.

Similar considerations prevail with respect to Respondent's refusal to continue to check off dues after the end of the contracts. The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. The very language of the contracts links Respondent's checkoff obligation to the Union with the duration of the contracts. Thus, they read: ". . . The Company will, beginning the month in which this Agreement is signed and so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month . . . his periodic Union dues for that month." Consequently, when the contracts terminated, the Respondent was free of its checkoff obligations to the Union.

<sup>5/</sup> *NLRB v. The Proof Company*, 242 F.2d 560 (C.A. 7); *NLRB v. Reed & Prince Manufacturing Company*, 205 F.2d 131 (C.A. 1); *NLRB v. Ross Gear & Tool Company*, 158 F.2d 607 (C.A. 7); *United States Gypsum Company*, 94 NLRB 112.

Under the current status of Board law, union-security requirements as well as contractually governed checkoff authorizations are created by contractual agreements and remain in force *only* so long as the agreement giving rise thereto remains in force. The United States Circuit Court of Appeals for the District of Columbia Circuit in *Xidex Corp. v. NLRB*, 924 F.2d 245 at 254-255 (D.C. Cir. 1991), observed, in a case where the union was attempting to have the Board reversed for failing to order the employer to pay the union money it would have received had the dues-checkoff provision of the expired collective-bargaining agreement remained in effect:

The union next contends that the Board erred in failing to order the employer to pay to the union the money that the union would have received had the dues check-off provision of the expired collective bargaining agreement remained in effect. This was not error on the Board's part. Section 8(a)(3) of the NLRA and sections 302(a)(2) and 302(c)(4) of the Labor Management Relations Act, 29 U.S.C. §§ 186(a)(2), 186(c)(4), permit an employer to make payments to a union only under a dues check-off provision contained in an effective collective bargaining agreement. *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986). The collective bargaining agreement had expired and, accordingly, the Board properly refused this portion of the union's requested order.

While not central to its decision in *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111 at 1114 (D.C. Cir., 1986), the circuit court observed that "dues-checkoff" was among the narrow class of exceptional mandatory subjects of bargaining that do not survive the expiration of a collective-bargaining agreement. The circuit court further observed "[t]he well-established exceptions for union-shop and dues checkoff are rooted in Section 8(a)(3) of the NLRA, 29 U.S.C. Sec. 158(a)(3) and Section 302(c)(4) of the

Labor-Management Relations Act, 29 U.S.C. Sec. 186(c)(4), which are understood to prohibit such practices unless they are codified in an existing collective bargaining agreement."

In the instant case, it appears that not only did the Union's right to dues deduction payments expire, but it, as contended by the Company, became unlawful for the Company to make such deductions and forward such to the Union.

Factually, based on the parties' agreement, and legally, I reject the Government's contention that principles gleaned from the above-outlined cases requires a finding that a checkoff clause that does not implement a union-security requirement is an 8(d) subject which survives the expiration of the parties' agreement. Cf. *Standard Oil Co. of California Western Operations*, 144 NLRB 520 at 525 (1963).<sup>16</sup>

I recommend the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company has not committed any unfair labor practices of which it is accused in the complaint.

Based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended.<sup>17</sup>

#### ORDER

The complaint is dismissed in its entirety.

<sup>16</sup> The Government cited two cases in support of its contention the dues-checkoff arrangements here, survived the expiration of the parties' contract. Both cases are distinguishable. First, the Government cited *Lowell Corrugated Container Corp.*, 177 NLRB 169 (1969), which involved a company that withheld union dues for one of two competing unions for a limited period after the collective-bargaining agreement giving rise thereto had expired. The Board found no violation by holding an employer may (permissibly) honor checkoff authorizations that have not been revoked, abrogated, terminated, or canceled notwithstanding that the contract sanctioning the authorizations has expired. The Board's holding in *Lowell Corrugated Container Corp.* does not require or suggest a finding that it would be an unfair labor practice for an employer to cease deducting union dues after the agreement sanctioning such authority has expired. It appears breach of a contractual arrangement between an employee and an employer in certain circumstances does not give rise to an unfair labor practice. The second case relied on by the Government is *Frito-Lay*, 243 NLRB 137 (1979). In *Frito-Lay*, the Board held that employees' revocation of their dues-checkoff authorizations made during a contract hiatus were ineffective and the union and the employer therein did not violate the Act by their failure to honor the revocations. The Board in *Frito-Lay* noted that the authorizations the employees executed in *Frito-Lay* expressly contemplated the possibility of periods when no contract would be in effect but that the authorizations could only be revoked during a narrowly drawn window once per year. Neither of the two cases require a different conclusion than the one I have arrived at herein.

<sup>17</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided by Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.